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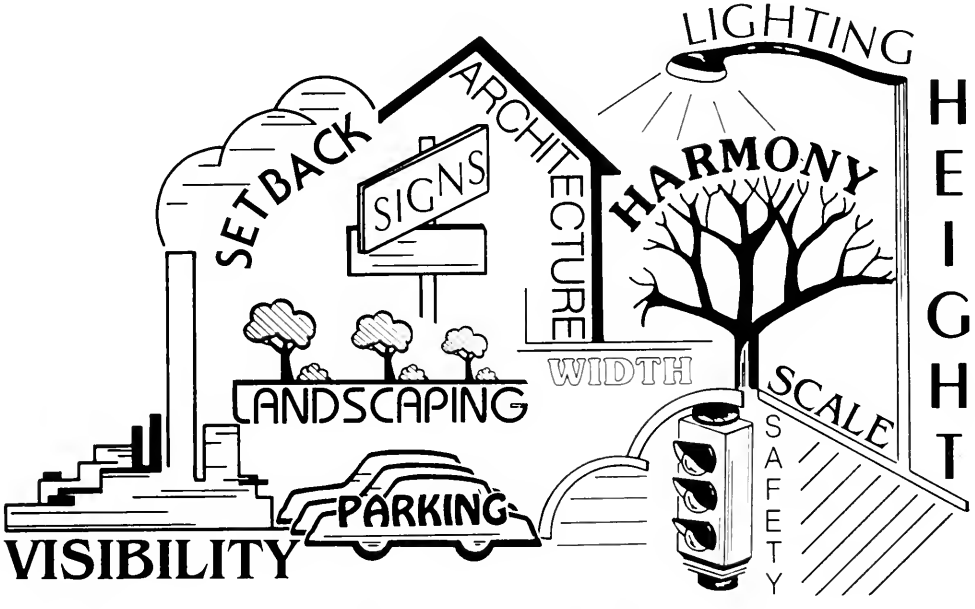
MONTANA ZONING DIGEST

A Comprehensive Summary of Judicial Decisions and Attorneys General Opinions Relating to the Law of Zoning in Montana



MONTANA DEPARTMENT OF COMMERCE
Local Government Assistance Division
Community Technical Assistance Program

February 1989

MONTANA ZONING LAW DIGEST

A Comprehensive Summary of Judicial Decisions and Attorneys General Opinions Relating to the Law of Zoning in Montana

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PREFACE

The Montana Zoning Law Digest is a comprehensive summary of judicial decisions and attorneys general opinions which have discussed the power of Montana's municipalities and counties to regulate the use of land under the State's zoning enabling statutes (sections 76-2-101 through 76-2-112, 76-2-201 through 76-2-301, and 76-2-301 through 76-2-412 of the Montana Code Annotated). All but two of the summarized decisions were issued by the Montana Supreme Court. One of these two was issued by the Ninth Federal Circuit Court of Appeals and the other by the Federal District Court for Montana, Helena Division. Although the latter opinion is unpublished, the author has made no attempt to collect and include other unpublished state or federal district court decisions. The Digest is exhaustive, however, with respect to reported state and federal cases arising under Montana law.

With regard to the Montana attorney's general opinions summarized herein, all but two are published and are identified by volume and number. The remaining two are informal "letter" opinions. However, the Digest does not purport to be exhaustive with respect to other unpublished opinions.

The Digest does not address zoning law issues arising under Montana law which have yet to be discussed in Montana Supreme Court decisions, published federal court decisions, or Montana attorneys general opinions. However, useful information regarding these matters may be obtained from any of several national zoning and planning law treatises such as Robert M. Anderson's American Law of Zoning, 3d, and Norman Williams, Jr.' American Land Planning Law.

Many of the decisions and opinions summarized herein contain statutory references to the Revised Codes of Montana, 1947, which in 1979 were recodified in the Montana Code Annotated. For the convenience of the reader the author has converted these references to current citations.

The information contained in the Digest should not be regarded as a substitute for obtaining competent legal advice concerning specific land use issues. The author encourages local government officials to consult with their city or county attorney before taking any zoning action which may have significant legal implications

Richard M. Weddle

Community Technical Assistance Program
Local Government Assistance Division
Montana Department of Commerce
Helena, Montana

February 1989

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VALIDITY OF ZONING ENABLING ACTS

I. Municipal Zoning Enabling Act

The municipal zoning enabling act (sections 76-2-301 through 76-2-328, MCA) is a constitutional delegation of the state's police power to municipalities. Freeman v. Board of Adjustment of City of Great Falls, 97 Mont. 342, 34 P.2d 534 (1934).

II. County Planning and Zoning District Act

Sections 76-2-101 through 76-2-112, MCA, which authorize counties to zone areas of land comprising at least 40 acres upon petition of 60 percent of the affected freeholders, are a valid delegation of power to the counties. City of Missoula v. Missoula County, 139 Mont. 256, 362 P.2d 539 (1961).

Under sections 76-2-101 through 76-2-112, MCA, the designation of parcels of 40 acres or more as county planning and zoning districts is not spot zoning. Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 620 P.2d 1189 (Mont. 1980).

RELATIONSHIP OF ZONING TO OTHER GOVERNMENTAL ACTIVITIES

I. Issuance of Building Permits

A. Issuance of Building Permits in Violation of Master Plan

The administrator of a building permit system can refuse to issue a permit for construction in an unzoned area if the use for which the permit is sought is not in compliance with the master plan for the area. Little v. Board of County Commissioners of Flathead County, 38 St. Rptr. 1124, 631 P.2d 1282 (Mont. 1981).

A local government which has adopted a master plan under section 76-1-604, MCA, may condition issuance of permits for the construction, alteration, or enlargement of structures upon compliance with the plan. 42 Op. Att'y Gen. 16 (1987).

B. Issuance of Permits in Violation of Zoning

A building permit issued in violation of a municipal zoning ordinance is void ab initio and creates no legal rights. State ex rel. Russell Center v. City of Missoula, 166 Mont. 385, 533 P.2d 1087 (1975).

C. Revocation of Improperly Issued Building Permit -- Doctrine of Equitable Estopple

Where the applicants for a building permit relied to their detriment on the mayor's erroneous representation that the permit had been issued and the town council later denied the application, and where the conduct of the council and mayor was fundamentally unfair, the town was estopped from denying the issuance of the permit. State ex rel. Barker v. Town of Stevensville, 164 Mont. 375, 523 P.2d 1388 (1974).

In applying the doctrine of equitable estoppel to police power situations courts should weigh the gravity of the injustice to the citizen if the doctrine is not applied against the injury to the common weal if the doctrine is applied. Where any danger to the public is slight and a citizen has made a good faith and substantial change in position in reasonable reliance upon the conduct or representations of municipal officials and agents, local governments are estopped from exercising their police power in a way which is inconsistent with their prior representations or actions. State ex rel. Barker v. Town of Stevensville, 164 Mont. 375, 523 P.2d 1388 (1974).

When a building permit has been issued in violation of the zoning ordinance, the applicant cannot invoke the doctrine of equitable estopple to prevent the revocation of the permit unless he has relied on it to his detriment. Even if the applicant has relied upon the representations of the governing body to his detriment, however, the court, in deciding whether to apply the doctrine, must weigh the gravity of the injustice to the citizen if the doctrine is not applied against the injury to the public welfare if the doctrine is applied. State ex rel. Russell Center v. City of Missoula, 166 Mont. 385, 533 P.2d 1087 (1975).

When an applicant relies to his detriment on an erroneously issued building permit and when, even if he had reviewed the zoning ordinance himself, he would not have discovered that the permit was erroneously issued, the doctrine of equitable estopple will prevent a municipality from revoking the permit. State ex rel. May v. Hartson, 167 Mont. 441, 539 P.2d 376 (1975).

D. Presumption that Permit Has Been Properly Issued

When the issuance of a building permit by the local government official charged with the enforcement of the zoning ordinance is reviewed by a district court, the official's decision to issue the permit is entitled to a rebuttable presumption of validity, regularity, and reasonableness. Whistler v. Burlington Northern Railroad Co. 44 St. Rptr. 1415, 741 P.2d 422 (Mont. 1987).

E. Improper Refusal to Issue Building Permit

A city council's refusal to issue a building permit even though the proposed development conforms to applicable zoning regulations is arbitrary and capricious and violates the applicant's right to substantive due process of law. Consequently, under the 14th amendment to the United States Constitution and 42 U.S.C., section 1983, the city council is liable to the applicant for the loss he suffers as the result of the refusal. Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988).

II. Condemnation

The owner of property which is being condemned cannot object to the condemning governmental entity's emphasis on the effect which zoning regulations have on the value of the property when the property owner, himself, first raises the subject of zoning. State Highway Commission v. Vaughan, 155 Mont. 277, 470 P.2d 967 (1970).

Zoning ordinances cannot limit the right of a governmental entity to exercise its power of eminent domain (dictum). State ex rel. Smart v. City of Big Timber, 165 Mont. 328, 528 P.2d 688 (1974).

The market value of condemned property is determined according to the most valuable use to which the property can be put. If the use of the property is limited by (flood plain) regulation, the value of the property must be based on the most valuable permitted use. Matter of Creation of West Great Falls Flood Control and Drainage District ex rel. Greenwood, 199 Mont. 261, 648 P.2d 297 (1982).

III. Application of Zoning to Governmental Entities

Section 76-2-402, MCA, exempts governmental entities from compliance with zoning regulations but requires that the public be given the opportunity to comment on any proposed nonconforming use. Under this provision the board of adjustment must conduct a public hearing on, but may not disallow, the proposed use. Hagfeldt v. City of Bozeman, 45 St. Rptr. 728, 757 P.2d 753 (Mont. 1988).

IV. Taxation

In determining on appeal whether the Department of Revenue has correctly assessed a parcel of real property, the State Tax Appeals Board must consider the effect if any, that a local zoning ordinance has on the market value of the property. DeVoe v. Department of Revenue, 45 St. Rptr. 1414 759 P.2d 991 (Mont. 1988).

V. Regulation of Municipal Utilities

The state planning and zoning enabling statutes have no impact on the Public Service Commission's authority of regulate municipal utilities. City of Billings v. Public Service Commission, 38 St. Rptr. 1162, 631 P.2d 1295 (Mont. 1981).

INVERSE CONDEMNATION AND THE REGULATORY "TAKING" OF PROPERTY

I. What Constitutes Inverse Condemnation or a "Taking"

An off-street parking permit ordinance which requires the building inspector and city engineer to review plans for commercial developments and to withhold permits for projects which do not meet the standards contained in the ordinance does not constitute a taking of private property for public use without just compensation under either the United States (14th Amend.) or the 1972 Montana Constitution (Art. II, Sections 17 and 29). State ex rel. Russell Center v. City of Missoula, 166 Mont. 385, 533 P.2d 1087 (1975).

The City of Billings condemned property on the east side of a major street in order to widen the street and made certain other improvements. The owners of residentially zoned property on the west side of the street sought a rezoning of their property to "residential professional," but enough other residents within the subdivision protested the change to require a three-fourths vote of approval by the city council under section 76-2-305, MCA. The rezoning request was denied when a majority, but not the necessary supermajority, of the council members voted to approve it.

The aggrieved property owners then brought an inverse condemnation action against the city claiming that the widening and improving of the street had rendered their property unsuitable and unsafe for residential use.

The Court held that under the unique facts involved in this case (i.e. property on one side of the street had been physically taken, increased traffic made the plaintiffs' land unsuitable for residential use, and the zoning limited the plaintiffs' to this use) an inverse condemnation of the plaintiff's property had occurred despite the fact that restrictive covenants prohibited the use of the affected lots for nonresidential purposes and despite the Court's finding that the City's refusal to rezone the lots was a legitimate use of its police power. Of particular concern was the fact that while the owners on the east side of the street had received compensation for their land, the owners on the west side had not. This, the Court concluded, resulted in the plaintiffs having to bear a disproportionate burden for the improvement of the street. Knight v. City of Billings, 197 Mont. 165, 642 P.2d 141 (1982).

"Inverse condemnation" is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant even though no formal exercise of the power of eminent domain has been attempted by the taking agency. Adams v. Department of Highways, 45 St. Rptr. 298, 753 P.2d 846 (Mont. 1988).

The interference with the use of property adjacent to a road caused by an increase in traffic resulting from improvements to the road does not constitute inverse condemnation if the aggrieved property owners have not been singled out to bear a burden greater than that borne by any property owner living adjacent to a roadway with increased traffic and if the plaintiffs' property is not zoned inappropriately for the traffic level. Adams v. Department of Highways, 45 St. Rptr. 298, 753 P.2d 846 (Mont. 1988).

II. Who May Maintain an Action for Inverse Condemnation

A property owner who bought a tract of land five years after it was zoned cannot maintain that the restrictions amount to an unconstitutional taking of his property without due process of law because any diminution in the value of the property occasioned by the restrictions occurred prior to his ownership. Cutone v. Anaconda-Deer Lodge, 187 Mont. 515, 610 P.2d 691 (1980).

A property owner cannot prevail in an action for inverse condemnation of his property if he purchased the property after the acts which constituted the inverse condemnation occurred. Howard v. State, 198 Mont. 470, 647 P.2d 828 (1982).

III. Physical Invasion Not Necessary to a Condemnation Claim

Under constitutions such as Montana's (Art. II, section 29) which provide that property may not be "taken or damaged" for public use without just compensation there need not be any physical invasion of an individual's property by a governmental entity to entitle him to compensation. Knight v. City of Billings, 197 Mont. 165, 642 P.2d 141 (1982); Adams v. Department of Highways, 45 St. Rptr. 298, 753 P.2d 846 (Mont. 1988).

IV. Defenses to Claims of Inverse Condemnation

When the police power has been properly invoked, compensation is not required for restriction on the use of private property. State v. Bernhard, 173 Mont. 464, 568 P.2d 136 (1977).

The fact that a governmental entity has validly exercised its police power does not, standing alone, prevent an inverse condemnation suit. Knight v. City of Billings, 197 Mont. 165, 642 P.2d 141 (1982); Adams v. Department of Highways, 45 St. Rptr. 298, 753 P.2d 846 (Mont. 1988). [cf. State v. Bernhard, 173 Mont. 464, 568 P.2d 136 (1977).]

A plaintiff may not maintain an action for inverse condemnation in federal court under 24 U.S.C., section 1983 (providing redress for violation of rights under the U.S. Constitution) until he has sought relief in state court under Montana law. Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988).

REQUIREMENTS FOR AND LIMITATIONS ON THE ENACTMENT, ENFORCEMENT, AMENDMENT, AND REPEAL OF ZONING ORDINANCES

I. Compliance with Enabling Acts Generally

Where the state zoning enabling act prescribes certain procedural steps, that procedure is usually regarded as mandatory. Consequently a substantial failure to comply with such requirements will render a zoning ordinance invalid. Dover Ranch v. County of Yellowstone, 187 Mont. 276, 609 P.2d 711 (1980).

Section 7-1-114, MCA, prohibits local government units which possess self-government powers from acting other than in the manner specified by state planning and zoning enabling acts. Consequently, because section 76-2-321, MCA, specifies that decisions of a board of adjustment may be appealed to district court, a self-governing local government may not provide for an alternative appeal of these decisions to the local government's legislative body. 38 Op. Att'y Gen. 98 (1980). [cf. Swart v. Molitor, 38 St. Rptr. 71, 621 P.2d 1100 (Mont. 1981), in which the Montana Supreme Court held that a self-government form of local government may assess fees for the cost of the examining land surveyor review authorized under the Montana Subdivision and Platting Act (sections 76-3-101 et seq., MCA) although the act does not authorize the imposition of such a fee.]

For zoning regulations to be valid they must have been adopted in substantial compliance with the procedural requirements of the enabling statute. However, strict compliance with the statute is not required. Petty v. Flathead County, 45 St. Rptr. 737, 754 P.2d 496 (Mont. 1988).

II. Planning Board's Role in County-Initiated Zoning

County zoning regulations adopted under sections 76-2-201 through 76-2-228, MCA, (county initiated zoning) by the board of county commissioners without first obtaining the recommendation of the city-county or county planning board, or both, as required by section 76-2-204, MCA, are void (dictum). Little v. Board of County Commissioners of Flathead County, 38 St. Rptr. 1124, 631 P.2d 1282 (Mont. 1981).

III. Zoning Commission's Role in Municipal Zoning

The only way a city commission can adopt a valid zoning ordinance without first referring the matter to the zoning commission as required by section 76-2-307, MCA, is to adopt the ordinance as an urgency measure under section 76-2-306, MCA. State ex rel. Diehl Co. v. City of Helena, 181 Mont. 306, 593 P.2d 458 (1979).

IV. Necessity of Establishing Board of Adjustment

The municipal zoning enabling act's authorization of the creation of a board of adjustment is a valid exercise of legislative power. The provision for a board of adjustment (or similar fact-finding body), vested with broad general powers, is important to the validity of both the zoning ordinance and the enabling act. In the absence of such a board vested with power to prevent the injustices which might otherwise result from a strict enforcement of the zoning ordinance, there would be grave doubts as to the constitutionality of the ordinance and the statute under which it was enacted. Freeman v. Board of Adjustment of City of Great Falls, 97 Mont. 342, 34 P.2d 534 (1934).

In order for a zoning ordinance to be a valid exercise of the police power it must provide for an appellate body, such as a board of adjustment, with the power to consider exceptional cases. Shannon v. City of Forsyth, 205 Mont. 111, 666 P.2d 750 (1983).

V. Role of Comprehensive Plan in County-Initiated Zoning

A. Nature of the Plan

In order for a comprehensive plan to support county-initiated zoning under section 76-2-201, MCA, the plan must be for the entire jurisdictional area of the planning board. Allen v. Flathead County, 184 Mont. 58, 601 P.2d 399 (1979).

The requirement of section 76-2-201, MCA, that before a county may enact zoning regulations it must have adopted a comprehensive development plan "for jurisdictional areas" pursuant to sections 76-1-101 through 76-1-606, MCA, contemplates the jurisdiction area of the planning board, not the jurisdictional area of the governing body. Martz v. Butte-Silver Bow Government, 196 Mont. 348, 641 P.2d 426 (1982).

B. Conformance of Zoning with the Plan

To be valid, zoning regulations adopted by a county under sections 76-2-201 through 76-2-228, MCA, must be in substantial compliance with the master plan adopted under section 76-1-604, MCA. Little v. Board of County Commissioners of Flathead County, 38 St. Rptr. 1124, 631 P.2d 1282 (Mont. 1981).

VI. County Planning and Zoning Districts (Sections 76-2-101, et seq., MCA)

A. Procedure for Creating Districts -- Comprehensive Plan Not Required

A petition for a county planning and zoning district filed under section 76-2-101, MCA, need not include proposed zoning regulations that the petitioners desire for the district. The county planning and zoning commission has the exclusive duty to make and adopt a development pattern for the district. 28 Op. Att'y Gen. 1 (1959).

Section 76-2-104, MCA, requires that the county planning and zoning commission adopt a development pattern only for the proposed planning and zoning district, not for the entire county. Doull v. Wohlschlager, 141 Mont. 354, 377 P.2d 758 (1963).

The development plan prepared by the county planning and zoning commission need be accompanied by maps and plats as specified by section 76-2-104(2), MCA, only when the commission has divided the district into separate areas within which different land uses are to be permitted. Doull v. Wohlschlager, 141 Mont. 354, 377 P.2d 758 (1963).

After a petition by 60 percent of the freeholders within a proposed planning and zoning district has been submitted to the county commissioners and the commissioners have created the district and have appointed the planning and zoning commission under section 76-2-101, MCA, but before the planning and zoning commission has adopted a development pattern for the district under section 76-2-104, MCA, signers of the petition may not withdraw

their names from the petition so as to invalidate the creation of the district. Letter Attorney General's Opinion to Thomas A. Olson, Esq., December 2, 1971.

In counties which do not have a county surveyor it is within the discretion of the county commissioners under section 76-2-102(1), MCA, to appoint a similarly qualified individual to a planning and zoning district commission to serve in lieu of the county surveyor. Letter Attorney General's Opinion to Ed Laws, Esq., May 23, 1978.

The procedural and substantive prerequisites to the adoption of county initiated zoning under sections 76-2-201 through 76-2-228, MCA, including the adoption of a comprehensive plan and conformance of zoning to the plan, do not apply to the creation of county planning and zoning districts under sections 76-2-101 through 76-2-112, MCA. Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 620 P.2d 1189 (Mont. 1980); Petty v. Flathead County, 45 St. Rptr. 737, 754 P.2d 496 (Mont. 1988).

For zoning regulations to be valid they must have been adopted in substantial compliance with the procedural requirements of the enabling statute. However, strict compliance with the statute is not required. Petty v. Flathead County, 45 St. Rptr. 737, 754 P.2d 496 (Mont. 1988).

If a zoning commission comprising the three county commissioners, the county assessor, and the county surveyor, already exists for a county planning and zoning district created under sections 76-2-101 through 76-2-112, MCA, it is unnecessary for the board of county commissioners to formally appoint a zoning commission at the time that a new planning and zoning district is created if the county commissioners notify the zoning commission that it must meet to determine a development pattern for the new district. Petty v. Flathead County, 45 St. Rptr. 737, 754 P.2d 496 (Mont. 1988).

B. Substantive Requirements for Creating Districts

Under section 76-2-109, MCA, a planning and zoning district may include land which is used for grazing, horticulture, agriculture, or the growing of timber. However, as long as the land is used for one or more of these purposes, regulations adopted for the district may not be applied to it. Doull v. Wohlschlager, 141 Mont. 354, 377 P.2d 758 (1963).

Under sections 76-2-103 and 76-2-104, MCA, a county planning and zoning commission has the implied authority to enforce its regulations by civil but not criminal proceedings. 30 Op. Att'y Gen. 19 (1963).

The 12-point test for zoning and rezoning first described in Lowe v. City of Missoula, 165 Mont. 38, 525 P.2d 551 (1974), does not to apply zoning and rezoning actions taken under sections 76-2-101 through 76-2-112, MCA, by county planning and zoning commissions. Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 620 P.2d 1189 (Mont. 1980).

Under sections 76-2-101 through 76-2-112, MCA, the designation of parcels of 40 acres or more as county planning and zoning districts is not spot zoning. Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 620 P.2d 1189 (Mont. 1980).

Under section 76-2-101(3), MCA, a county planning and zoning district must consist of one contiguous parcel, not separate and detached blocks of property. 42 Op. Att'y Gen. 43 (1987).

In establishing zoning under sections 76-2-101 through 76-2-112, MCA, the county may create a single district within which only one land use is permitted. Petty v. Flathead County, 45 St. Rptr. 737, 754 P.2d 496 (Mont. 1988).

When the development pattern proposed for a county planning and zoning district recommends a single land use classification, it need not refer to accompanying "maps, plats, charts, and descriptive matter" in order to be in substantial compliance with section 76-2-104(2), MCA. Petty v. Flathead County, 45 St. Rptr. 737, 754 P.2d 496 (Mont. 1988).

C. Procedure for Amending Regulations Within a Planning and Zoning District

The planning and zoning commission may change the interior boundaries of a planning and zoning district provided that the change is by affirmative vote of a majority of the commissioners, that proper notice has been given, and that a public hearing has been held as specified in section 76-2-106, MCA. Letter Attorney General's Opinion to Thomas A. Olson, Esq., December 2, 1971.

In amending regulations within a planning and zoning district created pursuant to sections 76-2-101 through 76-2-112, MCA, the planning and zoning commission need only refer to the guidelines set forth in section 76-2-104, MCA, which applied to the original establishment of the development pattern. Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 620 P.2d 1189 (Mont. 1980).

VII. Emergency or Interim Zoning

A. Compliance with Notice and Hearing Requirements

The provisions of section 76-2-205, MCA, which require notice and hearing prior to the adoption of permanent county zoning regulations, apply to the adoption of emergency zoning regulations under section 76-2-206, MCA. Bryant Development Assoc. v. Dagel, 166 Mont 252, 531 P.2d 1320 (1975); State ex rel. Christian, Spring, Sielbach & Associates v. Miller, 169 Mont. 242, 545 P.2d 660 (1976).

B. Review by Zoning Commission

A city commission may adopt an interim zoning ordinance under section 76-2-306, MCA, without first referring the matter to the zoning commission. Section 76-2-307, MCA, which requires that proposed zoning ordinances be reviewed by the zoning commission prior to adoption, applies only to permanent ordinances (dictum). State ex rel. Diehl Co. v. City of Helena, 181 Mont. 306, 593 P.2d 458 (1979).

VIII. Rezoning

A. Rezoning as a Legislative Act

There is no elemental distinction between the act of zoning and the act of rezoning. A rezoning ordinance, like a zoning ordinance, is a legislative enactment, and is entitled to the presumptions of validity and reasonableness. Schanz v. City of Billings, 182 Mont. 328, 597 P.2d 67 (1979). [cf. Lowe v. City of Missoula, 165 Mont. 38, 525 P.2d 551 (1974) and Little v. Board of County Commissioners of Flathead County, 38 St. Rptr. 1124, 631 P.2d 1282 (Mont. 1981)].

B. Procedural Requirements for Rezoning -- Failure to Satisfy

1. Generally

Where an applicant for a rezoning makes his own verbatim record of the hearing on his application, the city need not keep a verbatim record of the rezoning proceedings and enter written findings of fact in support of its decision. There is neither statutory nor Montana case law requiring the keeping of a verbatim record of rezoning proceedings or the entering of findings in support of the decision to grant or deny the rezoning. Although the legislature has imposed adjudicatory hearing procedures on proceedings before boards of adjustment, it has not done so with respect to rezoning proceedings. (This decision may be limited to the facts of the case.) Foster v. City Commission, 189 Mont 64, 614 P.2d 1072 (1980).

In amending county-initiated zoning regulations under section 76-2-205, MCA, the county commissioners must follow the same procedure required for the initial adoption of the regulations including adopting a resolution of intention to amend the regulations and publishing notice of the adoption of the resolution. In addition, the provision of section 76-2-205(6), MCA, which prohibits the creation of a zoning district or the adoption of regulations if 40 percent of the freeholders within the district protest against the proposed action applies to the amendment of the regulations. Dover Ranch v. County of Yellowstone, 187 Mont. 276, 609 P.2d 711 (1980).

Where the state zoning enabling act prescribes certain procedural steps, that procedure is usually regarded as mandatory. Consequently a substantial failure to comply with such requirements will render a zoning ordinance invalid. Dover Ranch v. County of Yellowstone, 187 Mont. 276, 609 P.2d 711 (1980).

2. Right to Protest Rezoning

Under section 76-2-305(2), MCA, which gives adjacent property owners special standing to protest against a proposed rezoning, when a city council amends the city's zoning ordinance by a three-fourths or greater vote, the rezoning is valid regardless of the number of protests filed against it. Olson v. City Commission of City of Helena, 146 Mont. 386, 407 P.2d 374 (1965).

For purposes of protesting against a proposed zoning action under section 76-2-205(6), MCA, each freeholder within a zoning district whose name appears on the county's last completed assessment role is entitled to one vote regardless of the number of parcels he owns within the district. 37 Op. Att'y Gen. 47 (1977).

Section 76-2-305(2), MCA, regarding the amendment of municipal zoning ordinances, creates four separate protest areas as follows:

a) the area of the lots included in the proposed change,

b) The area of the lots immediately adjacent in the rear of the lots included in the proposed change extending 150 feet from those lots,

c) the area of the lots adjacent on either side of the lots included in the proposed change within the same block, and

d) the area of the lots directly opposite the area of the blocks included in the proposed change extending 150 feet from the street frontage of the opposite lots.

If 20 percent of the owners of any of these areas protest against a proposed rezoning, the proposal can be approved only upon an affirmative vote of three-fourths of the city or town council. 37 Op. Att'y Gen. 58 (1977).

Under section 76-2-305(2), MCA, to the extent that a rezoning proposal does not encompass more than one district, as in the case of changing the use classification of an entire district, 20 percent of the owners of all lots included in the proposed change must protest against it to trigger the three-fourths voting requirement. 37 Op. Att'y Gen. 58 (1977).

Section 76-2-305, MCA, applies to proposed zoning amendments affecting nonrectangular or nonsquare parcels of land. Identification of the statutorily defined protest areas affected by the proposed amendments must be made with reference to the particular facts. 41 Op. Att'y Gen. 68 (1986).

C. Requirement that an Applicant for Rezoning Obtain the Consent of Neighboring Property Owners

1. Validity of Requirement

A "consent" zoning ordinance will fail if it is found to be arbitrary or capricious. Shannon v. City of Forsyth, 205 Mont. 111, 666 P.2d 750 (1983).

A "consent" zoning ordinance under which a person seeking a variance must obtain the consent of a certain percentage of the neighboring property owners is arbitrary and capricious if the exercise of a negative vote by one resident can defeat a petition for a variance. Shannon v. City of Forsyth, 205 Mont. 111, 666 P.2d 750 (1983).

2. Necessity of Having Review Guidelines and Board of Adjustment

To be upheld as a lawful delegation of legislative authority, a "consent" zoning ordinance must contain standards or guidelines which can be used by a board of adjustment to judge the propriety of a neighbor's withholding of consent. Shannon v. City of Forsyth, 205 Mont. 111, 666 P.2d 750 (1983).

To be a valid exercise of the police power a "consent" zoning ordinance must provide for an appellate body, such as a board of adjustment, with the power to consider exceptional cases. This appellate body must have the authority to grant variances in those cases in which the applicant has been unable to obtain the required consent. Shannon v. City of Forsyth, 205 Mont. 111, 666 P.2d 750 (1983).

SCOPE OF AND LIMITATIONS ON ZONING ORDINANCES

I. Use of the Police Power to Preserve Aesthetic Values

The preservation or enhancement of aesthetic values is a sufficient basis for the exercise by the state of its police power. [This case involved a constitutional challenge to Montana's motor vehicle wrecking facility licensing and screening law.] State v. Bernhard, 173 Mont. 464, 568 P.2d 136 (1977).

II. Use of Zoning to Preserve Property Values

The preservation of the economic value of property is a valid governmental interest which will support a city's use of its zoning power. Helone Company v. City of Helena, Fed. Dist. Ct. for Mont., Helena Div., No. CV 82-201-H, April 4, 1986 (unreported).

III. Authority to Adopt Development Moratoria

Under the municipal zoning enabling act (sections 76-2-301 through 76-2-328, MCA) a city has the implicit power to adopt a reasonable general moratorium on the issuance of development permits. However, in order for the moratorium to be valid it must be adopted in accordance with the procedural requirements of the enabling act. Consequently, if a moratorium is adopted as an urgency matter, the provisions of 76-2-306, MCA, regarding interim zoning ordinances must be followed. In addition, to be valid a moratorium must 1) be reasonable in length of time and scope, 2) be limited in purpose, 3) promote the health, safety, morals or the general welfare of the community, and 4) be designed to meet the purposes of zoning as set forth in section 76-2-304, MCA. State ex rel. Diehl Co. v. City of Helena, 181 Mont. 306, 593 P.2d 458 (1979).

IV. Exclusionary Zoning

A zoning ordinance under which only 6.7 percent of the zoned land area and 5.1 percent of the vacant land within the zoned area is available for the location of mobile homes raises the question of an unconstitutional exclusion of mobile homes. Martz v. Butte-Silver Bow Government, 196 Mont. 348, 641 P.2d 426 (1982).

V. Validity of Land Classifications and Regulations

A. Generally

The regulation of certain businesses which have particular characteristics but not of other businesses which lack those characteristics does not violate constitutional guarantees of equal protection of the law because the businesses are not similarly situated. Helone Company v. City of Helena, Fed. Dist. Ct. for Mont., Helena Div., No. CV 82-201-H, April 4, 1986 (unreported).

B. Unreasonable Classifications

Zoning regulations which, for no apparent reason, include commercially used land in a residential zone which is isolated in an otherwise commercial zone illegally discriminate against the parcel and are invalid. Alden v. Board of Zoning Commissioners, 165 Mont. 364, 528 P.2d 1320 (1974).

To be reasonable and constitutional a governmental zoning action need not be the only alternative or even the best alternative. Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 620 P.2d 1189 (Mont. 1980).

C. Classifications Valid if they Are "Fairly Debatable"

It is well established that a zoning ordinance is a valid exercise of the police power and will be upheld if any reasonable basis exists for the classifications within the ordinance. If the validity of the legislative classification for zoning purposes is "fairly debatable," the legislative judgment must be allowed to control. Cutone v. Anaconda-Deer Lodge, 187 Mont. 515, 610 P.2d 691 (1980).

D. Concept of "Highest and Best Use"

The municipal zoning enabling act does not require that zoning regulations allow property to be put to its "highest and best use." Such an interpretation would place an intolerable burden on local governments, and the entire purpose of local planning legislation would be defeated. Cutone v. Anaconda-Deer Lodge, 187 Mont. 515, 610 P.2d 691 (1980).

VI. Agricultural Land Uses and Mineral Development — Exemption from Regulation

Section 76-2-109, MCA, which prohibits a county planning and zoning district from regulating "lands used for grazing, horticulture, agriculture,

or the growing of timber," applies only as long as the land in question is repeatedly or continuously used for one or more of the specified purposes. The term "used" in this section has a present rather than a past meaning. Doull v. Wohlschlager, 141. 354 377 P.2d 758 (1963).

Under section 76-2-201, MCA, a county commission may zone land areas which include patented mining claims. However, under 76-2-209, MCA, the zoning regulations may not prevent the complete use, development, or recovery of mineral resources. 36 Op. Att'y Gen. 33 (1975).

An area's status as "open range," which is determinative of a livestock owner's liability for damage caused by his free-roaming stock, is unaffected by zoning regulations. Siegfried v. Atchison, 42 St. Rptr. 1807, 709 P.2d 1006 (Mont. 1985).

Sections 76-1-113 and 76-2-209, MCA, prohibit county zoning regulations from preventing the complete use, development, and recovery of mineral, forest, or agricultural resources. Under this prohibition a county may not forbid any activity necessary to develop a resource to the point at which it can be effectively utilized. With respect to gravel quarrying this may, depending on the location of the quarry, include the batching of concrete and asphalt as well as the washing, crushing, and screening of the gravel. Missoula County v. American Asphalt, Inc., 42 St. Rptr. 920, 701 P.2d 990 (Mont. 1985).

VII. Regulation of Mobile Homes

When a zoning ordinance authorizes the continuation of nonconforming uses which were in existence prior to its adoption and does not provide for their eventual attrition, the owner of a parcel on which is located a prior nonconforming mobile home is entitled to replace it with a new model. Under these circumstances the owner has a vested right to continue to use the parcel as a site for maintaining one single-family mobile home including replacement units. If the governing body wishes to provide for the eventual attrition of nonconforming structures or land use for residential trailer houses, its zoning ordinance must be amended to so provide. Kensmoe v. City of Missoula, 156 Mont. 401, 480 P.2d 835 (1971).

A zoning ordinance under which only 6.7 percent of the zoned land area and 5.1 percent of the vacant land within the zoned area is available for the location of mobile homes raises the question of an unconstitutional exclusion of mobile homes. Martz v. Butte-Silver Bow Government, 196 Mont. 348, 641 P.2d 426 (1982).

VIII. What Constitutes Residential Use of Property

A. Group Homes

For purposes of zoning, a community residential facility group home for eight or fewer developmentally disabled persons must be regarded as a residence and may be located in any area zoned for residential use (sections 76-2-411 and 76-2-412, MCA). Thelen v. City of Missoula, 168 Mont. 375, 543

P.2d 173 (1975), Mahrt v. City of Kalispell, 41 St. Rptr. 1979, 690 P.2d 418 (Mont. 1984).

An unlicensed 24-hour-care home for elderly persons who happen to have certain disabilities is not a community group home for developmentally, mentally, or physically disabled persons and, thus, is not a "community residential facility" as that term is defined by section 76-2-411, MCA. Consequently, section 76-2-412, MCA, which provides that community residential facilities serving eight or fewer persons on a 24-hour basis are considered residential uses for purposes of zoning, does not apply to the facility. Carey v. Wallner, 43 St. Rptr. 1706, 725 P.2d 557 (Mont. 1986).

Sections 76-2-411 and 76-2-412, MCA, were enacted to facilitate the location of group homes in residential neighborhoods. Their purpose was not to negate either the state licensing requirements for such homes or the relevant local zoning ordinances. Carey v. Wallner, 43 St. Rptr. 1706, 725 P.2d 557 (Mont. 1986).

B. Multifamily Dwellings

In an annexation agreement which authorized the continuation of certain nonconforming uses in an area to be annexed and zoned, the term "residential purposes" was not so clear on its face as to preclude multifamily residential uses. Derrenger v. City of Billings, 41 St. Rptr. 2276, 691 P.2d 1379 (Mont. 1984).

IX. Spot Zoning

Spot zoning is the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. State ex rel. Gutkowski v. Langhor, 160 Mont. 351, 502 P.2d 1144 (1972); Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 620 P.2d 1189 (Mont. 1980).

A rezoning that extends a preexisting zoning classification to include a larger area is not spot zoning. State ex rel. Gutkowski v. Langhor, 160 Mont. 351, 502 P.2d 1144 (1972).

Under sections 76-2-101 through 76-2-112, MCA, designation of parcels of 40 acres or more as county planning and zoning districts will not be considered spot zoning. Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 620 P.2d 1189 (Mont. 1980).

The following elements indicate the presence of impermissible spot zoning: a) the zoning allows a use which differs significantly from the prevailing use in the area, b) the zoning applies to a small area or benefits a small number of separate landowners, and c) the zoning is designed to benefit only one or a few landowners at the expense of the surrounding landowners or the general public. Little v. Board of County Commissioners of Flathead County, 38 St. Rptr. 1124, 631 P.2d 1282 (Mont. 1981).

X. Twelve-Point "Lowe" Test for Zoning and Rezoning

Section 76-2-304, MCA, establishes a 12-point test under which municipal governing bodies must consider whether a proposed zoning or rezoning of land:

a. is designed in accordance with the comprehensive plan;

b. is designed to lessen congestion in the streets;

c. will secure safety from fire, panic and other dangers;

d. will promote health and the general welfare;

e. will provide adequate light and air;

f. will prevent the overcrowding of land;

g. will avoid undue concentration of population;

h. will facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements;

i. gives reasonable consideration to the character of the district;

j. gives reasonable consideration to the peculiar suitability of the property for particular uses;

k. will conserve the value of buildings; and

l. will encourage the most appropriate use of land throughout the municipality.

Lowe v. City of Missoula, 165 Mont. 38, 525 P.2d 551 (1974). [Note: Section 76-2-203, MCA, establishes the same criteria for county-initiated zoning.]

A zoning or rezoning is invalid unless it is enacted in accordance with the 12 criteria contained in section 76-2-304, MCA, (Lowe test). Schanz v. City of Billings, 182 Mont. 328, 597 P.2d 67 (1979).

The 12-point test for zoning and rezoning first described in Lowe v. City of Missoula, 165 Mont. 38, 525 P.2d 551 (1974), does not apply to zoning and rezoning actions taken under sections 76-2-101 through 76-2-112, MCA, by county planning and zoning commissions. Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 620 P.2d 1189 (Mont. 1980).

XI. Relationship of Zoning to Private Land Use Restrictions

Zoning regulations cannot negate lawful private restrictions on the use of land. Kosel v. Stone, 146 Mont. 218, 404 P.2d 894 (1965).

XII. Regulation of Adult Uses

Zoning employed for the purpose of restricting protected speech, including that which is sexually explicit, based upon its content, violates the First Amendment of the U.S. Constitution. However, an ordinance which is not based upon the content of speech and does not proscribe speech but, rather, regulates its time, place, and manner does not violate the First Amendment to the U.S. Constitution if it is designed to serve a substantial government interest and it does not unreasonably limit public access to protected materials. Helone Company v. City of Helena, Fed. Dist. Ct. for Mont., Helena Div., No. CV 82-201-H, April 4, 1986 (unreported).

An adult-use zoning ordinance is constitutional only if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the government interest is unrelated to the suppression of speech; and (4) the incidental restriction of expression is no greater than that essential to further the government interest. Helone Company v. City of Helena, Fed. Dist. Ct. for Mont., Helena Div., No. CV 82-201-H, April 4, 1986 (unreported).

A city's interest in preventing deterioration of neighborhoods can be the basis for a adult-use ordinance. Helone Company v. City of Helena, Fed. Dist. Ct. for Mont., Helena Div., No. CV 82-201-H, April 4, 1986 (unreported).

An ordinance restricting adult bookstores and adult motion picture theaters to commercial-light manufacturing districts is a valid exercise of zoning authority where there are viable location sites within the areas in which the adult uses are permitted and the public record and proceedings surrounding enactment of the ordinance reveal that the primary concern of the city planners was the adverse effects of plaintiffs' business on the downtown area and not with suppressing plaintiffs' right to operate their business. Helone Company v. City of Helena, Fed. Dist. Ct. for Mont., Helena Div., No. CV 82-201-H, April 4, 1986 (unreported).

A zoning ordinance which prohibits adult bookstores and adult movie theaters from using sound equipment to attract customers, displaying merchandise so that it can be seen outside the business, and using any advertising sign not approved by the governing body are reasonably related to the city's interest in the health and welfare of its downtown area. Helone Company v. City of Helena, Fed. Dist. Ct. for Mont., Helena Div., No. CV 82-201-H, April 4, 1986 (unreported).

The choice of a method for locating adult uses, whether it be concentrating them in certain areas or disbursing them, is not of constitutional significance. Helone Company v. City of Helena, Fed. Dist. Ct. for Mont., Helena Div., No. CV 82-201-H, April 4, 1986 (unreported).

The regulation of certain businesses which have particular characteristics but not of other businesses which lack those characteristics does not violate constitutional guarantees of equal protection of the law because the businesses are not similarly situated. Helone Company v. City of Helena, Fed. Dist. Ct. for Mont., Helena Div., No. CV 82-201-H, April 4, 1986 (unreported).

There must be a factual basis for a municipality's decision to regulate adult uses through a zoning ordinance. However, a city is not required to conduct an independent, detailed empirical study of a particular adult business's impact on the community in order to regulate the location of that business. Rather, the city may rely on the expertise of its planning staff who have experience with the adverse impacts adult businesses have upon neighboring businesses and upon real estate appraisers who, although not having such experience, apply accepted principles of real estate analysis in projecting what impact an adult business will have on the value of surrounding properties. A city need not await deterioration or lessening of property values due to the presence of on or more adult businesses before it can act to regulate the location of these businesses. Helone Company v. City of Helena, Fed. Dist. Ct. for Mont., Helena Div., No. CV 82-201-H, April 4, 1986 (unreported).

CREATION, LIMITATION, AND TERMINATION OF NONCONFORMING USES

I. Maintaining Nonconforming Uses

The right to continue a nonconforming use is not limited to the person who owned the property at the time the zoning ordinance or regulation was adopted but passes to subsequent purchasers of the property. Watts v. City of Helena, 151 Mont. 138, 439 P.2d 767 (1968).

When a zoning ordinance authorizes the continuation of nonconforming uses which were in existence prior to its adoption and does not provide for their eventual attrition, the owner of a parcel on which is located a prior nonconforming mobile home is entitled to replace it with a new model. Under these circumstances the owner has a vested right to continue to use the parcel as a site for maintaining one single-family mobile home including replacement units. If the governing body wishes to provide for the eventual attrition of nonconforming structures or land use for residential trailer houses, its zoning ordinance must be amended to so provide. Kensmoe v. City of Missoula, 156 Mont. 401, 480 P.2d 835 (1971).

II. Expanding Nonconforming Uses

As a general rule, the area of a nonconforming use may not be enlarged or extended, except as such enlargement or extension is permitted by the zoning ordinance. Watts v. City of Helena, 151 Mont. 138, 439 P.2d 767 (1968).

Under a provision of a zoning ordinance which allows prior nonconforming uses not only to continue but to be expanded throughout the "building or premises," the term "premises" includes not only the lot on which the nonconforming use is actually located but lots adjacent to it which were held in common ownership when the ordinance was adopted. For purposes of such an "expansion" provision "premises" means property which, although it consists of several platted lots, has been in common ownership and treated as a unit. Watts v. City of Helena, 151 Mont. 138, 439 P.2d 767 (1968).

III. Terminating or Amortizing Nonconforming Uses

If a governing body wishes to provide for the eventual attrition of nonconforming structures or land use for residential trailer houses, its zoning ordinance must so provide. Kensmoe v. City of Missoula, 156 Mont. 401, 480 P.2d 835 (1971).

A zoning ordinance which prohibits adult bookstores and adult movie theaters in certain districts and requires that adult uses existing in those districts when the ordinance takes effect be discontinued within six months is reasonable as applied to a particular adult use if: (1) the business is under no obligation to remain at its present location, (2) the owners could sell products other than adult products at the same location, and (3) where (in this case, due to time involved in litigating the validity of the ordinance) the business has had ample time in addition to the six month period to prepare to move and recoup its investment in the present location. Helone Company v. City of Helena, Fed. Dist. Ct. for Mont., Helena Div., No. CV 82-201-H, April 4, 1986 (unreported).

GRANTING VARIANCES FROM ZONING REGULATIONS

I. Purpose of Granting Variances

The prime purpose of the variance is to benefit the community and the individual property owner by assuring that property capable of being used will not lie idle. Lambros v. Board of Adjustment of City of Missoula, 153 Mont. 20, 452 P.2d 398 (1969).

II. Criteria for Granting Variances

A. Generally

For the granting of a variance to be valid the following criteria must be met: 1) The variance must not be contrary to public interest, 2) a literal enforcement of the zoning ordinance must result in unnecessary hardship, owing to conditions unique to the property, and 3) the spirit of the ordinance must be observed, and substantial justice done. Lambros v. Board of Adjustment of City of Missoula, 153 Mont. 20, 452 P.2d 398 (1969); Wheeler v. Armstrong, 166 Mont. 363, 533 P.2d 964 (1975); Rygg v. Kalispell Board of Adjustment, 169 Mont. 93, 544 P.2d 1228 (1976); Cutone v. Anaconda-Deer Lodge, 187 Mont. 515, 610 P.2d 691 (1980).

The granting of a variance is not proper where the applicant fails to show that the public interest would be served by the variance. Wheeler v. Armstrong, 166 Mont. 363, 533 P.2d 964 (1975).

B. What Constitutes Unnecessary Hardship

The requirement that a petitioner for a variance show that literal enforcement of the existing zoning regulations will result in unnecessary

hardship is not met where the claimed hardship is self-imposed. Wheeler v. Armstrong, 166 Mont. 363, 533 P.2d 964 (1975).

The denial of a variance does not work an unnecessary hardship on a property owner who bought a parcel of land after the disputed zoning regulations were in place and who knew or should have known that they prohibited the use he wished to make of the tract. Cutone v. Anaconda-Deer Lodge, 187 Mont. 515, 610 P.2d 691 (1980).

C. When a Variance Is Properly Granted

A variance to permit a commercial development on residentially zoned property was properly granted where the land was not suitable for construction of single family residences because, among other things, it was located directly across a heavily travelled street from an athletic stadium, a variance had earlier been granted for the parcel (but not used), the granting of the variance would result in the removal of a nonconforming eyesore, and 79 percent of the landowners within 300 feet of the property favored granting the variance. Lambros v. Board of Adjustment of City of Missoula, 153 Mont. 20, 452 P.2d 398 (1969).

D. Requiring Consent of Neighbors

A "consent" zoning ordinance under which a person seeking a variance must obtain the consent of a certain percentage of the neighboring property owners is arbitrary and capricious if the exercise of a negative vote by one resident can defeat a petition for a variance. Shannon v. City of Forsyth, 205 Mont. 111, 666 P.2d 750 (1983).

III. Procedural Requirements for Considering Requests for Variances

Due process requires that an applicant for a variance be given an opportunity to be heard on his request. Even if the applicant has illegally established the land use for which he has requested a variance and the governing body is seeking judicial enforcement of its zoning regulations, the body responsible for granting and denying variances must accept an application for the variance and hold a hearing on the matter. Wheeler v. Armstrong, 159 Mont. 392, 498 P.2d 300 (1972).

IV. Validity of Denying Request for Variance

The denial of a variance does not render a zoning ordinance unconstitutional as applied to the aggrieved property owner where the board of adjustment has consistently refused to grant the type of variance sought by the aggrieved party and where there is no evidence of arbitrary or discriminatory administration of the ordinance. Cutone v. Anaconda-Deer Lodge, 187 Mont. 515, 610 P.2d 691 (1980).

JUDICIAL REVIEW OF ZONING ORDINANCES AND ADMINISTRATIVE DECISIONS — LEGAL REMEDIES AVAILABLE TO ENFORCE OR CHALLENGE A ZONING ORDINANCE

I. Declaratory Judgment

An aggrieved person may challenge a zoning ordinance's constitutionality in a declaratory judgment action without first exhausting the administrative remedies provided by the ordinance. Mitchell v. Town of West Yellowstone, 45 St. Rptr. 2226, 765 P.2d 745 (Mont. 1988).

II. Injunction

Under sections 76-2-103 and 76-2-104, MCA, a county planning and zoning commission has the implied authority to enforce its regulations by civil process but not by criminal proceedings. 30 Op. Att'y Gen. 19 (1963).

Where a planning and zoning district has been created under section 76-2-101, MCA, but no zoning regulations have been adopted for the district, it is impossible to predict whether future regulations will prohibit a proposed development. Consequently, a court may not enjoin the development of land within the district until zoning regulations are established. State ex rel. Corning v. District Court, 156 Mont. 81, 474 P.2d 701 (1970).

The district court may enjoin the adoption of zoning regulations when the statutory procedures for adoption have not been followed. When necessary to preserve the status quo, the court may enjoin the adoption of zoning regulations rather than waiting until the regulations are adopted and enjoining their enforcement. Little v. Board of County Commissioners of Flathead County, 38 St. Rptr. 1124, 631 P.2d 1282 (Mont. 1981).

The district court acted properly in enjoining the county commissioners from zoning a 59-acre tract of land solely to accommodate shopping center developers. The commissioners were not involved in adopting a general zoning policy for the area. Rather, they had selected a specific tract of land for a special zoning consideration for a particular owner. This activity is more quasi-judicial than legislative in nature and is beyond the authority of the commissioners. Little v. Board of County Commissioners of Flathead County, 38 St. Rptr. 1124, 631 P.2d 1282 (Mont. 1981).

III. Mandate (Mandamus)

A writ of mandate is not available to compel the issuance of a building permit for a land use which violates applicable zoning regulations. State ex rel. Russell Center v. City of Missoula, 166 Mont. 385, 533 P.2d 1087 (1975).

Because section 76-2-323(1)(a), MCA, provides that decisions of the zoning administrator may be appealed to the board of adjustment, the remedy of mandamus is not available to challenge these decisions. State ex rel. May v. Hartson, 167 Mont. 441, 539 P.2d 376 (1975).

The discretion of a local governing body to grant or deny permission to develop cannot be controlled by a writ of mandate or prohibition, or by declaratory judgment. The courts may not control the discretion of a municipal body or officer by mandamus. An abuse of discretion by such a body or officer can be reviewed in proper cases in a proceeding for a writ of review or certiorari. State ex rel. Diehl Co. v. City of Helena, 181 Mont. 306, 593 P.2d 458 (1979).

A writ of mandamus is not available to correct a zoning action already taken but may be used only to compel the performance of an act. Consequently, although a governing body's approval of a certain land use may have been substantively or procedurally improper, the action is not reviewable by a writ of mandamus. State ex rel. Popham v. Hamilton, 185 Mont. 26, 604 P.2d 312 (1979).

A city commission has no duty to enter written findings of fact in support of its decision to grant or deny a rezoning request, to keep a verbatim record of a rezoning proceeding, or to conduct its rezoning proceedings in a adjudicative manner so as to give an applicant full procedural due process rights. Consequently, a district court may not issue a writ of mandamus to compel the city commission to perform these acts. Foster v. City Commission of Bozeman, 189 Mont. 64, 614 P.2d 1072 (1980).

Because the decision to grant or deny a variance from zoning regulations is purely discretionary, the denial of a variance is not reviewable by writ of mandamus. Mandamus will lie to direct performance of a clear legal duty but not to control the discretion of a municipal body or officer. An administrative board may be enjoined from acting outside the scope of its authority and compelled by writ of mandate to perform an act it is legally bound to perform, but neither injunction nor mandate will lie to control the discretion of such a board unless it is clearly shown that the board has manifestly abused its discretion. State ex rel. Galloway, Inc. v. City of Great Falls, 211 Mont. 354, 684 P.2d 495 (1984).

IV. Presumption of Validity

There is no elemental distinction between the act of zoning and the act of rezoning. A rezoning ordinance, like a zoning ordinance, is a legislative enactment and is entitled to the presumptions of validity and reasonableness. Schanz v. City of Billings, 182 Mont. 328, 597 P.2d 67 (1979).

When dealing with the police power to protect the public safety and welfare, it is for the legislature to decide what regulations are needed. Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 620 P.2d 990 (Mont. 1980).

The enactment of a zoning ordinance is a legislative act, and zoning ordinances are presumptively valid. Helone Company v. City of Helena, Fed. Dist. Ct. for Mont., Helena Div., No. CV 82-201-H, April 4, 1986 (unreported).

A city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Helone Company v. City of Helena, Fed. Dist. Ct. for Mont., Helena Div., No. CV 82-201-H, April 4, 1986 (unreported).

When an administrative decision or order of a local government official charged with the enforcement of a zoning ordinance is reviewed by a district court, it is entitled to a rebuttable presumption of validity, regularity, and reasonableness. Whistler v. Burlington Northern Railroad, 44 St. Rptr. 1415, 741 P.2d 422 (Mont. 1987).

V. Review of Zoning and Rezoning Actions

Where the information upon which a local governing body acts in adopting a zoning or rezoning ordinance, or upon which a district court relies in reviewing the governing body's action, is lacking in fact and foundation, the action of the governing body or district court is clearly unreasonable and constitutes an abuse of discretion. Schanz v. City of Billings, 182 Mont. 328, 597 P.2d 67 (1979).

It is well established that a zoning ordinance is a valid exercise of the police power and will be upheld if any reasonable basis exists for the classifications within the ordinance. If the validity of a classification is "fairly debatable," the legislative judgment must be allowed to control. Cutone v. Anaconda-Deer Lodge, 187 Mont. 515, 610 P.2d 691 (1980).

A judgment of the district court upholding the discretion of zoning officials will not be set aside unless clearly erroneous. Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 620 P.2d 1189 (Mont. 1980).

VI. Rules for Interpreting Zoning Ordinances

Practically the same rules of construction apply to a zoning ordinance as apply to a statute. If the language of the ordinance is plain and unambiguous, it is not subject to interpretation or open to construction but must be accepted and enforced as written. Schanz v. City of Billings, 182 Mont. 328, 597 P.2d 67 (1979).

Since zoning laws and ordinances are in derogation of the common law right to free use of private property such ordinances should be strictly construed. At the very least, such ordinances must be given a fair and reasonable interpretation with some regard given the proposed use. Whistler v. Burlington Northern Railroad, 44 St. Rptr. 1415, 741 P.2d 422 (Mont. 1987).

When a court interprets a zoning ordinance, it should accord considerable judicial deference to the interpretation provided by an officer charged with the ordinance's enforcement. Whistler v. Burlington Northern Railroad, 44 St. Rptr. 1415, 741 P.2d 422 (Mont. 1987).

VII. Review of Decision to Grant or Deny Variance

A. Generally

When a property owner who has obtained a variance to construct a nonconforming building deliberately constructs the building, knowing that his neighbors have appealed the granting of the variance, in order to forestall an adverse decision on the appeal, the court will not be influenced by the fact that the property owner will lose his investment in the building if the variance is invalidated. Doull v. Wohlschlager, 141 Mont. 354, 377 P.2d 758 (1963).

The district court does not abuse its discretion by taking additional evidence [as is authorized by section 76-2-327(3), MCA] when it reviews a board of adjustment's decision to deny the granting of a variance. Lambros v. Board of Adjustment of City of Missoula, 153 Mont. 20, 452 P.2d 398 (1969).

Section 7-1-114, MCA, prohibits local government units which possess self-government powers from acting other than in the manner specified by state planning and zoning enabling acts. Consequently, because section 76-2-327, MCA, specifies that decisions of a board of adjustment may be appealed to district court, a self-governing local government may not provide for an alternative appeal of these decisions to the local government's legislative body. 38 Op. Att'y Gen. 98 (1980).

B. Standard and Scope of Review

1. Generally

The court will not substitute its judgment for that of a board of adjustment if the record shows that there was substantial evidence to support the board's decision. The court will not substitute its discretion for the discretion of an officer, board, or body acting within the scope of his or its exclusive authority. Freeman v. Board of Adjustment of the City of Great Falls, 97 Mont. 342, 34 P.2d 534 (1934).

Although the scope of review on a writ of certiorari is ordinarily limited to whether an inferior judicial or quasi-judicial tribunal has exceeded its jurisdiction, section 76-2-227, MCA, gives the district court a much broader scope of review than do the general Montana statutes pertaining to certiorari. Bryant Development Assoc. v. Dagel, 166 Mont 252, 531 P.2d 1320 (1975).

A board of adjustment's decision to grant a variance will not be set aside by the courts unless the party challenging the action shows that granting the variance constituted an abuse of discretion. Rygg v. Kalispell Board of Adjustment, 169 Mont. 93, 544 P.2d 1228 (1976).

A board of adjustment did not abuse its discretion by granting a variance permitting the location of a law office in a residentially zoned neighborhood when the neighborhood was in transition and the office would be compatible with the remaining residential uses. Rygg v. Kalispell Board of Adjustment, 169 Mont. 93, 544 P.2d 1228 (1976).

The scope of review of a decision to grant or deny a variance is limited to the determination of whether competent and substantial evidence exists to support the disputed finding and whether the court or board of adjustment has clearly abused its discretion. Cutone v. Anaconda-Deer Lodge, 187 Mont. 515, 610 P.2d 691 (1980).

2. When the District Court Has Taken Additional Evidence

If, in reviewing a board of adjustment's denial of a request for a variance, the district court takes no additional evidence, its function is to determine whether the board abused its discretion. Lambros v. Board of Adjustment of City of Missoula, 153 Mont. 20, 452 P.2d 398 (1969).

If the district court, in reviewing a board of adjustment's denial of a request for a variance, takes additional evidence as permitted by section 76-2-327(3), MCA, the test on appeal to the Supreme Court of the district court's decision is whether the lower court, not the board of adjustment, abused its discretion or committed an error of law. Lambros v. Board of Adjustment of City of Missoula, 153 Mont. 20, 452 P.2d 398 (1969).

D. Doctrine of laches

A person who has obtained a variance to construct an otherwise prohibited building and who constructs the building within the 30-day period provided by section 76-2-110, MCA, for aggrieved persons to appeal the granting of a variance proceeds at his own risk and may not invoke the doctrine of laches to block an appeal filed within the statutory period. Doull v. Wohlschlager, 141 Mont. 354, 377 P.2d 758 (1963).

VIII. Hardship as Bar to Enforcement

Hardship is not a defense in an action to enforce zoning regulations when the claimed hardship was self-imposed. Doull v. Wohlschlager, 141 Mont. 354, 377 P.2d 758 (1963).

WORDS AND PHRASES DEFINED

I. Accessory Use

A 44-foot by 80-foot steel building is not "accessory" to a residential use. Doull v. Wohlschlager, 141 Mont. 354, 377 P.2d 758 (1963).

II. Frontage

In a rezoning context the term "frontage" generally refers to that part of the parcel sought to be rezoned that gives access frontage on a roadway, alley, or other public way. 41 Op. Att'y Gen. 68 (1986).

III. Inverse condemnation

"Inverse condemnation" is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant even though the taking agency has not attempted to formally exercise its power of eminent domain. Adams v. Department of Highways, 45 St. Rptr. 298, 753 P.2d 846 (Mont. 1988).

IV. Pipeline

Petroleum storage tanks used in conjunction with the transmission of oil through a pipeline were properly regarded as part of the pipeline and were deemed to be permitted uses in a zoning district within which pipelines were a permitted use but petroleum storage tanks were prohibited. Whistler v. Burlington Northern Railroad Co., 44 St. Rptr. 1415, 741 P.2d 422 (Mont. 1987).

V. Premises

As used in a zoning ordinance which allowed a nonconforming use to be expanded throughout the "building or premises" the term "premises" means property that is a unit such as lots which are adjacent to the lot on which is located the nonconforming use and which are in common ownership with that lot. Watts v. City of Helena, 151 Mont. 138, 439 P.2d 767 (1968).

VI. Spot Zoning

"Spot zoning" is the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. State ex rel. Gutkowski v. Langhor, 160 Mont. 351, 502 P.2d 1144 (1972).

VII. Used

As used in section 76-2-109, MCA, which prohibits a county planning and zoning district from regulating "lands used for grazing, horticulture, agriculture, or the growing of timber," the word "used" connotes a continuing or repeated use and has a present rather than a past meaning. Doull v. Wohlschlager, 141. 354 377 P.2d 758 (1963).

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